RECENT CASES.

BANKRUPTCY — PROPERTY VESTING IN TRUSTEE. — *Held*, that the interest of a husband in the real estate of his wife during her lifetime and after issue born does not pass to his trustee in bankruptcy. *Hesseltine* v. *Prince*, 95 Fed. Rep. 802 (Dist. Ct., Mass.).

By the general provisions of section 70 of the Bankruptcy Act of 1898 all interests in real estate of the bankrupt vest in the trustee. Under the corresponding section, § 14, of the Bankruptcy Act of 1867 the courts had no difficulty in holding that the estate of a tenant by the curtesy initiate passed to his trustees subject to the limitations inherent in the nature of the estate. *Re M'Kenna*, 9 Fed. Rep. 27. The same result was reached under a similar provision of the English Bankruptcy Statute. *Cooper* v. *McDonald*, 7 Ch. D. 288. Such, doubtless, should be the general rule. But the Federal court in the principal case is governed by Massachusetts law, which does not consider this species of estate transferable. *Lynde* v. *MacGregor*, 95 Mass. 182. The decision, therefore, will probably not be followed in other jurisdictions.

BANKRUPTCY — SET-OFF OF CLAIMS. — A and B were jointly liable on a promissory note, and B was also indebted to A. A became bankrupt and B paid the note. *Held*, that B cannot set off a moiety of the note against his indebtedness to the estate of A. *Re Bingham*, 94 Fed. Rep. 796 (Dist. Ct., Vt.).

The Bankruptcy Act of 1898, § 68, following the Bankruptcy Act of 1867, § 20, directs a set-off in all cases of mutual debts except debts arising after the bankruptcy or procured after the bankruptcy with a view to such use. The present case does not fall within these exceptions, since the claim existed before the bankruptcy and the claimant came into the position of the original obligee by subrogation. *Smith* v. *Brinkerhoff*, 6 N. Y. 305; *Humphreys* v. *Blight*, 4 Dill. 370. But, to constitute mutual debts within the meaning of the statute, it is held requisite that they should be contracted between the same persons in the same capacity and in the same right. *Re Lane*, 2 Low. 305; *Munger* v. *Albany, etc. Bank*, 85 N. Y. 580; *Gray* v. *Rollo*, 18 Wall. 629. And since in the principal case the claim of the debtor against the estate is that of another, gained by subrogation, the lack of such mutuality seems obvious. Accordingly, the refusal of the court to allow the set-off is unexceptionable.

BILLS AND NOTES — TRANSFER AFTER MATURITY — NOTICE. — A pledgee of a promissory note, wrongfully transferred it after maturity to an innocent party. *Held*, that the transferee is entitled to collect the note. *Young Men's, etc. Co.* v. *Rockford Nat. Bank*, 5 N. E. Rep. 297 (Ill.).

The court goes on the ground that the defendant could not be charged with notice of the wrongful transfer because the rule that the transferee after maturity takes subject to equities applies only to equities between maker and payee. It is generally held, however, that any defence which would be valid against the transferer of a note is equally valid against the transferee after maturity. *Miller* v. *Bingham*, 29 Vt. 82; *Hatch* v. *Dennis*, 10 Me. 244. These cases regard such a transfer as not depriving the true owner of his title; an overdue note in this respect resembling an ordinary chattel. *Texas* v. *Hardenburg*, 10 Wall. 68. A better view seems to be that the title to such paper passes on assignment just as it does before maturity, and that the fact that it is overdue charges the holder with notice of equities existing between the maker and payee, since he must know that the note should be home at maturity. To say, however, that the holder must at his peril find out the rights as between previous holders is burdensome and unjust. The principal case, while contrary to the great weight of authority, seems good sense and sound principle. *Connell* v. *Bliss*, 52 Me. 476.

CARRIERS — RAILROADS — MONOPOLIES. — A railroad company prohibited all public vehicles except those of one corporation from standing and soliciting business before the entrance to its depot. *Held*, that this regulation is invalid as tending to restrict competition and enhance prices. *Indianapolis Union Ry. Co.* v. *Dohn*, 53 N. E. Rep. 937 (Ind.).

The existence of statutory or constitutional provisions has complicated the decisions on this point, but the weight of authority is probably in accord with the principal case. *Hack. & Bus. Co.* v. *Sootsma*, 84 Mich. 195; *State* v. *Reed*, 24 So. Rep. 308. The decisions *contra* distinguish between granting the sole right to receive and deliver passengers and the sole right to solicit them, finding an interference with public right only in the former case. *Old Colony R. R.* v. *Tripp*, 147 Mass. 35; *New York, etc. R. R. Co.* v.

Sheeley, 27 N. Y. Supp. 185. The question is one purely of public policy, and on the whole the view of the principal case seems the better. Reasonable regulations fixing the time and place in which hackmen may solicit are essential for proper service and are permissible; but the law may well refuse to allow a railroad to create a practical monopoly in which there is great possibility of public injury without any corresponding probability of public advantage.

CONSTITUTIONAL LAW — EX POST FACTO LAWS. — A retroactive law substituted life imprisonment for the death penalty as the punishment for murder. *Held*, that as to offences committed before the passage of the law and punishable thereafter, it is not an *ex post facto* law. *McGuire* v. *State*, 25 So. Rep. 495 (Miss.). See NOTES.

CONSTITUTIONAL LAW — MUNICIPAL CORPORATION — REGULATION OF WEIGHT OF BREAD. — *Held*, that a city ordinance fixing the minimum weight of a loaf of bread is invalid. *Buffalo* v. *Collins Baking Co.*, 57 N. Y. Supp. 347 (Sup. Ct., App. Div., Fourth Dept.).

The ground taken in this somewhat novel decision is that the ordinance interferes unreasonably with the right of each individual to regulate his own business. Granting that the municipality had any power to regulate the weight of a loaf, it cannot be said that the provisions of the ordinance in question were an unreasonable exercise of that power. And the right of a municipality to regulate the weight and quality of bread has had repeated judicial recognition. *Munn* v. *Illinois*, 94 U. S. 113, 125; *People* v. *Wagner*, 86 Mich. 594; *Paige* v. *Fazackerly*, 36 Barb. 392; *Mobile* v. *Yuille*, 3 Ala. 137. It is difficult to support the case, which is chiefly interesting as illustrating a not unusual tendency to give undue weight to an ordinary conception of the term "liberty."

CONSTITUTIONAL LAW — SUCCESSION TAX. — *Held*, that the succession tax in the War Revenue Act of 1898 is constitutional. *High* v. *Coyne*, 93 Fed. Rep. 450 (Cir. Ct., Ill.). See NOTES.

CONTRACTS — FRAUD — NEGLIGENCE. — A lessee who was unable to read signed a lease after it had been read to him by the lessor, who fraudulently suppressed certain conditions contained therein. *Held*, that the lessee is bound by such conditions as against the lessor. *Binford* v. *Bruso*, 54 N. E. Rep. 146 (Ind.).

The court cited *Lindley* v. *Hofman*, 53 N. E. Rep. 471, for the proposition that the order to relieve the signer of an instrument from liability thereon, not only must the instrument have been obtained by fraud, but also the party executing it must have been free from negligence. In that case, however, the rule was invoked against the maker of a promissory note, which was in the hands of a purchaser for value without notice. There is no doubt that an innocent purchaser of negotiable paper, obtained by fraud, may collect it from a negligent maker, *Leach* v. *Nicols*, 55 Ill. 273; but such a case furnishes no argument for the proposition that an instrument obtained by fraud should be enforced between the parties because the signer was negligent. A man may act on a positive representation of fact, notwithstanding the fact that means of knowledge were open to him. *Cottrill* v. *Krum*, 100 Mo. 397. And when one relies on another's statement, that other should not be allowed to say he was negligent. *Smith* v. *Land, etc. Corporation*, 28 Ch. D. 7. It is difficult to see how the case can be supported. See *Alexander* v. *Brogley*, 43 Atl. Rep. 888, *contra*.

CONTRACTS — GUARANTY — DEATH OF GUARANTOR. — On a written guaranty not under seal the seller sought to charge the guarantor's estate for goods sold after the guarantor's death, but before he had notice of that fact. *Held*, that the death of the guarantor was a revocation of the guaranty as regards all sales made after that time. *Aitken* v. *Lang's Admr.*, 51 S. W. Rep. 154 (Ky.). See NOTES.

CONTRACTS — ILLEGAL CONTRACTS — EIGHT HOUR LAW. — A statute provided that the working day in smelters and mines should be eight hours; and that any "person, body corporate, agent, manager, or employer" violating the provisions of the act should be deemed guilty of a misdemeanor. *Held*, that the statute applies alike to employer and employee, and an employee working in a smelter more than eight hours per day cannot recover for his services during the overtime. *Short* v. *Bullion, etc. Mining Co.*, 57 Pac. Rep. 720 (Utah).

This appears to be the only decision on a point of considerable interest. A dissenting opinion takes the ground that the statute was designed to protect the laborer against oppression by his employer, and should not be turned against him whom it was intended to benefit. The United States Supreme Court expressed *obiter*, a similar opinion in passing upon the constitutionality of the law. *Holden* v. *Hardy*, 169 U. S. 366, 397. This construction is perhaps more consistent with the somewhat ambiguous wording of the enactment. On the other hand, the view of the majority, that the law, dealing as it does with occupations peculiarly injurious to the health, was passed as

a protection not only to the laborer, but to the community at large, embodies a broader and more satisfactory conception of the policy of the enactment, and justifies the conclusion that the employee cannot waive its provisions. *Birkett* v. *Chatterton*, 13 R. I. 299.

CONTRACTS — JUDICIAL SALE — DESTRUCTION OF PROPERTY BEFORE DEED. — A purchaser at a judicial sale paid part of the purchase money, but before the deed was delivered the premises were partly destroyed by fire. *Held*, that the purchaser has gained no legal or equitable title, and is, therefore, not bound to take the premises. *Harrigan* v. *Golden*, 58 N. Y. Supp. 726 (Sup. Ct., App. Div., Second Dept.).

It has been held in New York that in a judicial sale the mortgagee cannot enforce specific performance against the purchaser, because the referee is the seller, and he alone can invoke the aid of equity. *Mitchell* v. *Bartlett*, 51 N. Y. 447. As the right to equitable actions is mutual, it follows from this reasoning that the purchaser could specifically enforce the sale against the referee. The position of the principal case that the purchaser gains no equitable title by the sale is clearly inconsistent with this deduction from the earlier case. Moreover, if the ordinary purchaser of land is to be given equitable rights against the seller before the delivery of the deed, it is difficult to see why the vendee at a judicial sale should not have similar rights, and decisions in other States are in line with this opinion. *Duff* v. *Randall*, 116 Cal. 226; *Stewart* v. *Freeman*, 22 Pa. St. 120.

CONTRACTS — SUIT BY BENEFICIARY. — M contracted with C to leave her property by will to the plaintiff, her niece, but wrongfully devised it to the defendant. *Held*, that the plaintiff as beneficiary is entitled to enforce performance of the contract by the defendant. *Everdell* v. *Hill*, 58 N. Y. Supp. 447 (Sup. Ct., Special Term).

The New York courts have previously held that an intended beneficiary, not a party to the contract, can maintain an action for its performance only when such person is related lineally or married to the promisee, or has a legal claim against the promisee and thus a legal interest in the execution of the agreement. *Buchanan* v. *Tilden*, 158 N. Y. 109; *Durnherr* v. *Rau*, 135 N. Y. 219. The principal case carries still further the doctrine of consideration by relationship, which at the outset seems opposed to sound principle. See 12 HARV. LAW REV. 560. Justice might be accomplished equally well on the equitable theory of constructive trusts. The defendant has received through the wrongful act of another property, for which he gave no value. He therefore should hold the same as a constructive trustee for the victim of the wrong. See 13 HARV. LAW REV. 227.

CRIMINAL LAW — HOMICIDE — SELF DEFENCE. — *Held*, that to justify the taking of life in self defence, the accused must show that he had reasonable grounds for believing himself in great peril of life or serious bodily harm. *People* v. *Kennedy*, 54 N. E. Rep. 51 (N. Y.).

The doctrine of this decision is supported by the great weight of authority. *Maher* v. *People*, 24 Ill. 241; *Shorter* v. *People*, 2 N. Y. 193; *Nabois* v. *State*, 25 So. Rep. 529. It has been held, indeed, that if the accused can show that he acted from an honest belief in the greatness and imminence of his peril he will be excused. *Grainger* v. *State*, 5 Yerg. 459. But the dangers of such a broad rule are self-evident; the slightest appearances might justify the most extreme measures. The question being one of public policy, the probable results to the community at large govern, and therefore a reasonable as well as an honest belief on the part of the defendant should be demanded.

CRIMINAL LAW — SUICIDE AFTER ASSAULT. — X, after being mortally wounded by a shot from the defendant's gun, cut his own throat. *Held*, that the defendant is guilty of homicide. *People* v. *Lewis*, 57 Pac. Rep. 470 (Cal., Sup. Ct.). See NOTES.

DAMAGES — BREACH OF CONTRACT. — In an action against the defendant for the breach of his promise to make the plaintiff an heir, *held*, that the measure of damages is the value of the services rendered and the outlay incurred by the promisee on the faith of the promise. *Sandham* v. *Grounds*, 94 Fed. Rep. 83 (C. C. A., Third Cir.).

It is a fundamental rule that the measure of damages for a breach of contract is the value of the promise, and not the consideration nor the outlay. *Roper* v. *Johnson*, L. R. 8 C. P. 167. And such also is the rule in cases of anticipatory breach like the present. *Brown* v. *Muller*, L. R. 7 Ex. 319. Accordingly, upon principle the measure of damages in the principal case should be the present value to the promisee of the estate of the promisor at his death. But such a value would usually be so uncertain as to be incapable of proof, and consequently the promisee would fail wholly. See 13 HARV. LAW REV. 149. As it avoids this unfortunate result the rule adopted in the present case which allows the promisee to recover his outlay is to be commended although it is contrary to the theory of damages. In accord are *Hutchinson* v. *Snider*, 137 Pa. St. 1; *Bernstein* v. *Meech*, 130 N. Y. 354; *United States* v. *Behan*, 110 U. S. 338.

EVIDENCE — HEARSAY — DECLARATIONS OF INTENTION. — In a suit to probate a will, the issue was undue influence. *Held*, that declarations of the testator, made before, at the time of, or after making the alleged will are admissible to establish his intention. *Re Burn's Estate*, 52 S. W. Rep. 98 (Tex., Civ. App.).

An exception to the rule of evidence excluding hearsay admits declarations of declarant's existing state of mind, that is to say, contemporaneous statements of intention. *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285. Much confusion has arisen from a failure to distinguish between such cases and those where a declaration is introduced as tending to show a weak mental condition. Such declarations of a testator, made within a reasonable time after the execution of the will, may give rise to a legitimate inference on the issue of his sanity at the time of the execution. *Waterman* v. *Whitney*, 11 N. Y. 593. But the case is quite different where a testator's declaration of his own intention is offered. Such declarations may be made under such circumstances as to be of direct probative value on the issue of intention at another time, but the court in the principal case seems not to have gone into that question. The rule laid down admitting generally declarations made after the will, is apparently the result of a failure to make the distinction noted above.

EVIDENCE — RAPE — CHARACTER OF PROSECUTRIX. — In a prosecution for rape, *held*, that evidence is admissible to prove that the prosecutrix had previously had intercourse with other men. *People* v. *Shea*, 57 Pac. Rep. 885 (Cal. Sup. Ct.).

The court declined to overrule the early case of *Benson* v. *State*, 6 Cal. 221, holding that specific acts of unchastity with men other than the defendant might be proved to negative the probability of resistance on the part of the prosecutrix. This rule has been adopted in a few cases. *State* v. *Reed*, 39 Vt. 417; *Titus* v. *State*, 7 Baxt. 132. But the general and better view is that, while the chastity of the prosecutrix may be questioned, it can be attacked only by evidence of general reputation. 3 Greenl. Ev., 14th ed., 203; *Commonwealth* v. *Harris*, 131 Mass. 336; *State* v. *Fitzsimon*, 18 R. I. 236. It is an objection to the rule of the principal case that it allows a multiplicity of issues and is likely to work a surprise on the prosecution; nor is proof of specific acts so much more persuasive on the question of chastity than evidence of general reputation as to counterbalance its manifest disadvantages.

EVIDENCE — SUBSEQUENT REPAIRS — RELEVANCY. — *Held*, that evidence of repairs having been made to machinery after an accident is admissible to show negligence in not having made such repairs at an earlier period. *Champion Ice Mfg., etc. Co.* v. *Carter*, 51 S. W. Rep. 16 (Ky.).

The rule laid down in the present case finds favor in several jurisdictions. *McKee* v. *Bidwell*, 74 Pa. St. 218; *St. Louis, etc. R. R. Co.* v. *Weaver*, 35 Kan. 315. Subsequent repairs, however, do not necessarily show prior negligence or defect, as they may be acts of extreme caution and not absolutely requisite for protection. It would be better, therefore, to exclude such evidence as irrelevant and as having but little probative value. *Atchison, etc. R. R. Co.* v. *Parker*, 12 U. S. App. 132. Its admission, moreover, will have the undesirable tendency to discourage employers in making alterations and repairs which would render machinery more safe and accidents less frequent. The great weight of authority is *contra* to the present case. *Columbia, etc. R. R. Co.* v. *Hawthorne*, 144 U. S. 202; *Corcoran* v. *Village of Peekskill*, 108 N. Y. 151.

PERSONS — DIVORCE — TEMPORARY ALIMONY. — In an action for divorce, brought by the wife, the husband denied the marriage. *Held*, that in order to be entitled to temporary alimony the wife must prove the marriage by a preponderance of the evidence. *Hite* v. *Hite*, 57 Pac. Rep. 227 (Cal. Sup. Ct.).

The view taken by the principal case was adopted in *McKenna* v. *McKenna*, 70 Ill. App. 340. On the other hand it has been held that, in order to get temporary alimony, it is enough for the wife to make out a fair probability that she will maintain her allegations. *Brinkley* v. *Brinkley*, 50 N. Y. 184; *Collins* v. *Collins*, 80 N. Y. 1. Although such a proceeding is summary, the only safe rule is to require that essential facts be proved by a preponderance of the evidence that is presented at the hearing. Considerations of public policy in divorce cases should have no great weight, since either rule may work hardship in extreme cases. Hence, while the authority on this point is about evenly divided, the rule of the principal case seems the preferable one.

PROCEDURE — PHYSICAL EXAMINATION. — In an action for personal injuries, *held*, that the court has the power to compel the plaintiff, on pain of dismissal, to submit to a physical examination by medical experts. *Lane* v. *Spokane Falls, etc. Ry. Co.*, 57 Pac. Rep. 367 (Wash.).

The above decision is supported by the weight of authority. *Schroeder* v. *Chicago, etc. Ry. Co.*, 47 Iowa, 375; *Graves* v. *City of Battle Creek*, 95 Mich. 266. Some courts deny the existence of such a power on the ground that it infringes upon the right of

personal immunity. *Union Pacific Ry. Co.* v. *Botsford*, 141 U. S. 200; *McQuigan* v. *Delaware, etc. R. R. Co.*, 129 N. Y. 50. The latter view seems extreme and not conducive to justice. A physical examination is the best kind of evidence of the character and extent of an injury, and would produce no serious personal inconvenience or danger if conducted in a proper manner and by competent persons. The doctrine of the principal case thus tends to a better ascertainment of the truth and a prevention of fraudulent actions, and on these grounds may be justly commended. 1 Greenl. Ev., 16th ed., § 469 *m*.

PROPERTY — LEASE — HOLDING OVER. — The defendants, lessees of the plaintiff for one year, gave notice that they would surrender the premises at the expiration of the term. Owing to a serious illness in the family they were obliged to hold over for two weeks. *Held*, that the landlord cannot continue the lease for another year. *Herter* v. *Mullen*, 53 N. E. Rep. 700 (N. Y.). See NOTES.

PROPERTY — LOSS OF LIEN. — The plaintiff in an action of trover declared on a factor's lien, but later amended and averred title. *Held*, that the right to insist on the lien is not thereby destroyed. *Rosenbaum* v. *Hayes*, 79 N. W. Rep. 987 (N. D.).

Both the English and American authorities are contrary to the view expressed, holding that the mere assertion of ownership destroys the lien. *Boardman* v. *Sill*, 1 Camp. 410, note; *Hanna* v. *Phelps*, 7 Ind. 21; *White* v. *Gainer*, 3 Bing. 23. While these cases take the ground that the lien is lost by merger, they fail to explain how one right can merge in the mere assertion of another. The court in the principal case discards this view and rests the decision of such cases on the ground of estoppel. The result thus reached commends itself as a just solution of the question. If the defendant has relied on the assertion of title and has been thereby damaged, the plaintiff will be prevented from setting up his lien. Otherwise the plaintiff's error will not prejudice his rights.

PROPERTY — STATUTE OF LIMITATIONS — ADVERSE USE. — The defendant occupied real property for the statutory period under a mistaken belief that it was part of the public domain, and with the expectation of acquiring title from the government. *Held*, that this does not constitute adverse possession under a statute vesting the adverse possessor for the required time with a perfect title. *Beale* v. *Hite*, 57 Pac. Rep. (Oreg.).

If a man innocently occupies another's land under the belief that it is his own, so that there is in fact a claim of title against the world, his possession is generally considered adverse. See 13 HARV. LAW REV. 152. The principal case raises the question whether a claim antagonistic to the owner's title merely is sufficient, and on this point there is a direct conflict. In accord with the view therein expressed is *Schleicher* v. *Gatlin*, 85 Tex. 270. *Contra* are *Fellows* v. *Evans*, 53 Pac. Rep. 491; *McManus* v. *O'Sullivan*, 48 Cal. 7. The latter decisions seem right. The exact wording of the statute, on which the principal case lays such stress, is unimportant, since statutes of limitation are now generally considered as vesting the title, no matter what their wording. Their object is to quiet title, and the underlying theory is that the owner is barred after a certain time by his negligence. As such negligence arises wherever there is an unopposed occupancy under a claim hostile to the owner's title, the existence of such a claim alone should be sufficient to bar recovery.

PROPERTY — TREES — SEVERANCE. — *Held*, that standing trees sold in contemplation of immediate severance from the soil are personal property. *Tilford* v. *Dotson*, 51 S. W. Rep. 583 (Ky.).

The weight of authority in this country is opposed to the view here taken. *Hirth* v. *Graham*, 50 Ohio St. 57; *Green* v. *Armstrong*, 1 Denio, 550. In England and in a number of the States, however, the doctrine of the principal case has prevailed. *Marshall* v. *Green*, 1 C. P. D. 35; *Claflin* v. *Carpenter*, 45 Mass. 580. This doctrine rests upon the theory of constructive severance, the expressed intention of the parties to the sale being regarded as bringing about a change in the nature of the subject-matter. Such a view is objectionable as adding to the number of legal fictions; and, moreover, it is confusing and unnecessary. There appear to be no cases where the attempt has been made to apply it to similar easily removed products of the earth, such as coal and stone. It is simpler and more logical to regard all such substances as retaining the inherent quality of realty until severed.

SALES — STATUTE OF FRAUDS — *Held*, that a contract for the sale of articles to be manufactured is within a statute requiring a writing in the case of a sale of goods or chattels of a certain price or over. *Mechanical Boiler Cleaner Co.* v. *Kellner*, 43 Atl. Rep. 599 (N. J., Sup. Ct.).

The court in this case has adopted the Massachusetts view that a contract to sell articles to be manufactured in the regular course of business is a sale of goods within

the Statute of Frauds, and not a contract for labor and materials. *Mixer* v. *Howarth*, 38 Mass. 205; *Goddard* v. *Binney*, 115 Mass. 450. The New York courts, on the other hand, hold that a contract of sale is not within the statute unless the articles are in existence at the time the agreement is made. *Parsons* v. *Loucks*, 48 N. Y. 17; *Cooke* v. *Millard*, 65 N. Y. 352; *Higgins* v. *Murray*, 73 N. Y. 252. Since the degree of completion required under the phrase "in existence" has never been defined by the New York courts, the uncertainty of the rule tends to cause confusion and renders it unsatisfactory in practice. It would seem, then, that as between the two doctrines the one existing in Massachusetts is preferable.

TORTS — CONTRACTS — DUTY TO THIRD PARTIES. — The defendant company contracted to furnish the city with a supply of water adequate for protection in case of fire. The plaintiff's house was burned because of the defendant's failure to perform the contract. *Held*, that the plaintiff can recover. *Gorrell* v. *Greensboro Water Supply Co.*, 32 S. E. Rep. 720 (N. C.).

While the declaration in the principal case sounded in tort the court seems to have allowed a recovery on the ground of contract. In either aspect it is difficult to support the decision. The cases almost universally hold that one who by contract assumes an obligation to use care toward another is not thereby placed under any duty toward third parties. *Winterbottom* v. *Wright*, 10 M. & W. 109. Nor does the principal case fall within an exception which holds that such a duty is imposed when the subject-matter of the contract is dangerous to life. *Thomas* v. *Winchester*, 6 N. Y. 397. If, on the other hand, the case be considered from the standpoint of contract, the great weight of authority is against allowing a recovery where the beneficiary is not expressly named, but belongs merely to a class which is benefited by the performance of the agreement. *Boston, etc. Trust Co.* v. *Salem Water Co.*, 94 Fed. Rep. 238; *Bush* v. *Artesian, etc. Water Co.*, 43 Pac. Rep. 69.

TORTS — CONTRIBUTORY NEGLIGENCE — LOOK AND LISTEN RULE. — *Held*, that the failure of a plaintiff to stop, look, and listen before crossing a railroad track, is not contributory negligence as a matter of law. *Judson* v. *Central Vermont R. R. Co.*, 53 N. E. Rep. 514 (N. Y.); *Illinois Central R. R. Co.* v. *Jones*, 95 Fed. Rep. 370 (C. C. A., Sixth Cir.).

These cases establishing the law in the United States Circuit Courts and the New York Court of Appeals in regard to the look and listen rule, are in accord with the great weight of authority and lay down the better doctrine. *Terre Haute, etc. R. R. Co.* v. *Voelker*, 129 Ill. 540; *Cincinnati, etc. R. R. Co.* v. *Farra*, 31 U. S. App. 307. Contributory negligence is a question depending on the circumstances of each particular case, and for the court to say that the plaintiff is negligent as a matter of law in every case if he does not stop, look, and listen before crossing a railroad track, seems an unwarrantable encroachment on the province of the jury. Yet such a rule is firmly established in some jurisdictions, particularly Pennsylvania. *Pennsylvania R. R. Co.* v. *Beale*, 73 Pa. St. 504; *Reading & Columbia R. R. Co.* v. *Ritchie*, 102 Pa. St. 425.

TORTS — DAMAGES — MENTAL SUFFERING. — While the plaintiff and his wife were passengers on the defendant's road, drunken men were allowed to enter the car, and use obscene language. *Held*, that the plaintiff may recover for injury to his wife's feelings. *Houston, etc. Ry. Co.* v. *Perkins*, 52 S. W. Rep. 124 (Tex. Civ. App.).

By the weight of authority mental suffering is not regarded as an element of damages except when it is the result of physical injury. *Victorian Ry. Commrs.* v. *Coultas*, 13 App. Cas. 222; *Spade* v. *Lynn, etc. R. R.*, 168 Mass. 285. However, an increasing number of cases allow damages where such mental suffering results in perceptible physical injury. *Bell* v. *Great Northern Ry. Co.*, 26 L. R. Ir. 428; *Purcell* v. *St. Paul City Ry.*, 48 Minn. 134. The latter seems the sounder view. In fact, whatever injury results from a tortious act, should, in theory, be compensated for in damages. But as a matter of public policy, it is best to restrict this rule to cases where the fact of injury to the nervous system can be clearly shown through its effect upon the body. Without this restriction a flood of groundless and fraudulent claims would inevitably result. The principal case, while logically unassailable, overlooks the pernicious results sure to ensue from its practical application. Its doctrine has been followed, however, in a number of jurisdictions. *Wadsworth* v. *Western Union Tel. Co.*, 86 Tenn. 695; *Reese* v. *Western Union Tel. Co.*, 123 Ind. 294.

TORTS — DECEIT — PLEADING. — The plaintiff brought an action of deceit against the defendants for inducing a violation of the Foreign Enlistment Act. The latter demurred on the ground that the declaration disclosed a joint violation of said act by the plaintiff. *Held*, that the demurrer is overruled. *Burrows* v. *Rhodes & Jameson*, 80 L. T. Rep. 591. See NOTES.

TRUSTS — FRAUD — CONSTRUCTIVE TRUST. — A was about to make a gratuitous transfer of land to X. B, by fraud, induced A to convey the property to an innocent purchaser in consideration of certain notes and a mortgage on the property given to B. *Held*, that X is not entitled in equity to have the notes and mortgage assigned to her by B. *Sipes* v. *Decker*, 78 N. W. Rep. 769 (Wis.).

If B had by fraud induced A to convey the land in question to her, she would have been compelled to hold it as constructive trustee for X. *Segrave* v. *Kirwin*, Beat. 157; *Bulkley* v. *Wilford*, 2 Cl. & Fin. 177. Had she in breach of that trust conveyed the *res* to a purchaser for value without notice she would have held the proceeds of the transaction upon a like trust. *Trevelyn* v. *White*, 1 Beav. 589; *Cheney* v. *Gleason*, 117 Mass. 557. The fact that the conveyance was made directly to an innocent vendee does not change the principle involved or affect the rights and duties of the parties concerned. B, through her fraud, has got into her control the product of property which would otherwise have gone to X, and such product in good conscience belongs to X. Therefore, the court should, in accordance with established rules of equity and in analogy to decided cases, have declared B a trustee of these securities for the grantor's intended beneficiary.

TRUSTS — PAROL AGREEMENT — CONSTRUCTIVE TRUST. — The plaintiff purchased and had conveyed to the defendant, his wife, a tract of land which the wife orally agreed to hold in trust for him. *Held*, that the plaintiff is not entitled to have the land conveyed to him. *Murray* v. *Murray*, 53 N. E. Rep. 946 (Ind.).

It is well settled in Indiana that a resulting trust does not arise where the husband pays the purchase price for land and the title is vested in the wife, although there is no statute forbidding it. *Lochenour* v. *Lochenour*, 61 Ind. 595; *Montgomery* v. *Craig*, 128 Ind. 48. The court might, however, have given the land to the plaintiff upon another theory. It is held in England that a grantee of land upon an oral trust to reconvey, who refuses to fulfil his obligation, must hold as constructive trustee for the grantor. *Davies* v. *Otty*, 35 Beav. 208; *Haigh* v. *Kaye*, L. R. 7 Ch. 469. The plaintiff in the principal case was in substantially the same position as the grantor in the English cases, and was entitled to a like relief if they are sound. It is believed that they are. The courts do not enforce an express trust in violation of the Statute of Frauds. They create a new trust upon the ground that the grantee shall not take advantage of the statute to work a fraud, but must either perform his undertaking or surrender the land to him who is in equity best entitled to it. This doctrine has been generally repudiated in this country, but there has been some tendency recently to adopt it in cases like the present. *Gage* v. *Gage*, 31 N. Y. Supp. 903.

REVIEWS.

THE NECESSITY FOR CRIMINAL APPEAL as illustrated by the Maybrick Case. Edited by J. H. Levy. London. 1899. pp. vii, 609.

The chief value of this book is the verbatim report of Mrs. Maybrick's trial, now for the first time published in convenient form. Both in itself and in the legal circumstances that surround it, this is one of the most remarkable trials of the century, and it well repays careful study.

The five hundred pages of trial, in the intention of the editor, are merely illustrative of the need of some court for the revision of convictions of crime. In further emphasis of this need, he has appended statements of the law of many countries bearing on the question of revision. This part of the book is perhaps neither so useful nor so convincing as the editor hoped. Revision of a criminal conviction may mean either of two things, — revision of the facts, or a new trial because of error of law. In foreign systems of law these two things are not clearly distinguished, as the statements in this book show; in our system of law the distinction is fundamental and necessary. The desire for a Court of Criminal Appeal which shall revise findings of fact is a desire with which most lawyers will not greatly sympathize. Why should one accused of crime, who has